

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 MAY 28 PM 2:49

JEANNE HICKS, CLERK

B. Chamberlain

BY: _____

Larry A. Hammond, 004049
Anne M. Chapman, 025965
OSBORN MALEDON, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
lhammond@omlaw.com
achapman@omlaw.com

John M. Sears
P. O. Box 4080
Prescott, Arizona 86302
(928) 778-5208
John.Sears@azbar.org

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Division 6

**VISITATION: A MATTER OF
HUMAN DECENCY AND THE
CONSTITUTION**

(Expedited Oral Argument
Requested)

Steven DeMocker's attorneys ask this Court to recognize that the United States and Arizona Constitutions, informed by even the most minimal respect for human decency, require that Mr. DeMocker be afforded the right to see and communicate with his children, his parents, his fiancé, and his family. It is incumbent on this Court to enforce those basic rights that the Sheriff will not, and order reasonable visitation for Mr. DeMocker.

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MEMORANDUM

Mr. DeMocker is on trial for his life. Mr. DeMocker is being denied all rights to see and communicate directly with anyone who is not a member of Mr. DeMocker's legal team. Mr. DeMocker is presumed innocent. He has been convicted of no crime. He is detained by the Sheriff of Yavapai County, at least in theory, not as punishment but as a condition to assure Mr. DeMocker's attendance at his own trial. Mr. DeMocker has been in the custody of the Sheriff since October 23, 2008. For 17 months he has complied meticulously with the rules governing his detention. This Court has had, now, an almost uncountable number of opportunities directly to observe Mr. DeMocker's behavior in Court. The Court must agree that Mr. DeMocker has given the Sheriff no provocation for denying him during the trial for his life the opportunity that every other pretrial detainee in the State of Arizona enjoys.

Given his compliant history, it is shocking to learn that the Sheriff and the Jail Commander have concocted a scheme to deny Mr. DeMocker any visitation from his family for the duration of his trial, which is expected to last at least two more months. It would be disturbing enough if a denial of visitation were to occur at a time when Mr. DeMocker was not on trial. It would be stunning enough if a denial of visitation were to occur to any defendant facing serious felony charges, but to have that denial arise at the beginning of a death penalty trial is almost beyond imagination. Even if there were no constitutional considerations, this unspeakable denial would so violate basic notions of civility and human decency that the Court must intervene. In this case, however, for reasons not explained by the Court, Mr. DeMocker's direct pleas for assistance have gone unanswered. For the reasons that follow, we ask this Court to intervene to the very limited extent necessary to secure Mr. DeMocker's rights.

The combination of the Sheriff's obdurate decision-making and the Court's unwillingness to take a stand against it, now create constitutional questions of great

1 magnitude. First, this set of circumstances constitutes a direct interference with Mr.
2 DeMocker's due process rights to participate in his own defense. A superficial
3 assessment of this situation might lead a person to observe that Mr. DeMocker has not
4 been denied the right to confer with his lawyers. Ergo, one might argue, there could be
5 no argument of interference with his right to counsel and his right to a defense. One
6 need only to have been in court last Friday, May 21, 2010, to see the fallacy in that
7 suggestion. When the Court declined to intervene at the very end of a long and stressful
8 week, Mr. DeMocker gave up the manful and stoic veneer he has kept throughout these
9 proceedings. He broke down and cried in the courtroom as it emptied. Understandably,
10 the realization that he would have no visitation throughout this trial was a crushing
11 blow.

12 One need not be a psychologist to understand the consequences of this kind of
13 deprivation of human contact at the most stressful moments in a defendant's life. It
14 would take little imagination to visualize the conversation that hypothetically might
15 have occurred at that moment between Mr. DeMocker and his attorneys. He might have
16 asked those attorneys – two men who between them have practiced law for 75 years –
17 whether they have ever been involved in a case in which a death penalty defendant was
18 denied all visitation during trial. One might also easily imagine the despair
19 accompanying the answer that, no, not only have these lawyers not been involved in
20 any such case, they have never even heard of one. Even the most vilified and hated
21 capital defendants have been allowed reasonable visitation. Indeed, the only analog we
22 could find anywhere is the isolation suffered by the Guantanamo detainees. It is a
23 shameful truth that the only death penalty defendants anyone can remember suffering a
24 deprivation of this kind are the alleged plotters of September 11th and Steven
25 DeMocker.
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1 Mr. DeMocker is a pretrial detainee. Because he has been convicted of no crime,
2 he has a constitutionally protected right to liberty that may not be subjected to severe
3 restrictions "which amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).
4 Thirty years ago the United States Supreme Court set forth the standards that may
5 ultimately prove relevant here. Pretrial conditions such as the denial of all visitation
6 during a trial are punitive when there is a showing of either an express intent to punish
7 the pretrial detainee, when the conditions are unnecessarily excessive in light of
8 legitimate non-punitive purposes, or when jail officials are deliberately indifferent to
9 substantial risks of harm to the inmate. *Bell v. Wolfish*, 441 U.S. at 561. *See also*
10 *Zarnes v. Rhodes*, 64 F.3d 285, 290 (7th Cir. 1995). If Mr. DeMocker had been placed
11 in administrative segregation and for that reason had been denied all visitation, we
12 would be standing before this Court arguing that his conditions of confinement not only
13 constitute a deprivation of due process but also amount to cruel and unusual punishment
14 under the 8th Amendment. *E.g. Ruiz v. Johnson*, 37 F.Supp. 2d 855, 861 (S.D. Tex.
15 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154
16 F.Supp. 2d 975 (S.D. Tex. 20010). Of course, Mr. DeMocker is not in administrative
17 segregation. He has done nothing that would warrant such conditions. To the contrary,
18 he is well and constructively integrated into the jail population. He is deprived of
19 visitation for one or the other of only two possible reasons: either this is a deliberate
20 attempt by the jail to punish Mr. DeMocker and to interfere with his defense, or it is a
21 product of the most searing and deliberate indifference.

22 It is important to remember that even if Mr. DeMocker had been convicted of
23 this crime, the prison officials could not deny him the opportunities of visitation without
24 justification. *See Farmer v. Brennan*, 511 U.S. 825 (1994) There can be no doubt that
25 it is within the provance of this Court to prevent any unjustifiable interference with Mr.
26 DeMocker's right to be treated in accord with the Constitution. *See e.g. Benjamin v.*
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1 *Fraser*, 264 F.2d 175, 186 (2nd Cir. 2001) and *United States v. Gotti*, 755 Fed.Supp.
2 1159, 1165 (E.D.N.Y. 1991).

3 Ordinarily, when asked to address questions with respect to interferences with a
4 defendant's right to prepare a defense and to be treated as someone who has not
5 committed a crime, courts are encouraged to look at whether the restriction is
6 reasonably related to some legitimate penalogical interest. *Turner v. Safely*, 482 U.S.
7 78, 89 (1980). Again, ordinarily, when courts are asked to determine whether a
8 restriction is reasonably related to some legitimate interest, a court must consider: (1)
9 whether there is a valid, rational connection between the restriction and the alleged
10 governmental interest; (2) whether alternative means exist for the exercise of the
11 detainee's constitutional rights; (3) whether there are any adverse effects from
12 accommodating the detainee's constitutional right; and (4) whether there is an absence
13 of any ready alternatives which can protect the detainee's rights. *Id.* at 91. We ask the
14 Court to pause for just a moment to consider these questions. We submit that there can
15 be virtually no doubt whatsoever that the restriction on all visitation throughout the
16 course of a lengthy death penalty trial serves no rational governmental interest other
17 than the interest in some form of administrative convenience, the same kind of
18 administrative convenience that would be served by simply denying visitation to
19 everyone in our jails – a step that even Sheriff Joe Arpaio has been unwilling to
20 consider.

21 It is unmistakably clear that there are obvious alternative ways in which Mr.
22 DeMocker's constitutional rights can be realized. He can be afforded visitation on one
23 or another of the days when he is incarcerated at the jail and not in court – which turn
24 out to be exactly one-half of all days between now and the end of this trial! He could be
25 afforded visitation here in this courthouse over the lunch hour or before or after any
26 court day. He could be afforded similar visitation at the county jail facility one block
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1 from this courthouse where Mr. DeMocker is taken before sunrise every day of the
2 week when he is in court.

3 Would there be any adverse effects from accommodating this right? We can
4 imagine none, again, other than the marginal and virtually uncountably insignificant
5 cost that might be associated with this simple accommodation.

6 There are two additional considerations that dominate our thinking. First, the
7 rights not only of Mr. DeMocker but of the victims of this horrible homicide must be
8 considered. The Court has ruled – absolutely correctly – that Katie DeMocker and
9 Charlotte DeMocker are victims. As such, they are entitled to be treated with dignity.
10 Our Arizona Constitution says so. Our Arizona Legislature says so. Our Arizona
11 criminal rules say so. We need not review the multitude of provisions that have been
12 put in place to assure that victims are fairly treated. We submit that there could be no
13 more fundamental element of a victim's rights than the right of these young women to
14 communicate with their father. We have all watched with increasing horror over the
15 last three weeks as Mr. DeMocker has been denied the opportunity to visit with his
16 daughters both of whom are engaged in graduation ceremonies from their respective
17 institutions – Katie, from Occidental College, and Charlotte from Prescott High School.
18 Unless an order is entered by this Court, on Friday night of this week, Charlotte
19 DeMocker will walk across a stage at Prescott High and will receive her diploma and
20 for the last month she will not have been able to have a private, face-to-face, eye-to-eye,
21 communication with her father. Even in court, the detention officers have tried to
22 prevent Mr. DeMocker and his family from smiling at each other. It is hard to imagine
23 a more touching and obvious deprivation of human decency.

24 Mr. DeMocker's elderly parents have come here from Rochester, New York.
25 The Court has seen them sitting behind counsel table, day after dispiriting day while
26 prospective jurors consider whether they might be able to vote for his execution—a
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1 conclusion essential if they are to hear the evidence in this case. By this Friday Steve
2 DeMocker will have been denied for a full month the opportunity to speak directly, eye-
3 to-eye with his own parents. He will have endured the same separation from his fiancé
4 who, until the commencement of this trial, had made the considerable effort to visit
5 Steven DeMocker on a weekly basis.

6 Lastly, we must remind the Court of the possible severe consequence to Mr.
7 DeMocker if, for any reason, he suffers a psychological breakdown as a result of this
8 mistreatment. Under *Skipper v. South Carolina*, 475 U.S. 1, 5 (1980), and *Simmons v.*
9 *South Carolina*, 512 U.S. 154 (1994), Mr. DeMocker will have the right to present at
10 the mitigation stage of this trial—if we should ever get there—his history of positive
11 adjustment to the jail environment. Today, the story he can tell is a literally perfect one.
12 The deprivation of contact between Mr. DeMocker and his loved ones may compromise
13 our ability to make that statement three months from now. It is the duty of counsel, and
14 we submit the duty of this Court, to take the minimal steps necessary to make sure that
15 this day never comes – the day when it will be reported that Mr. DeMocker broke under
16 the extraordinary psychological pressures associated with the denial of contact with
17 loved ones while on trial for his life.

18 We beg this Court to order the limited accommodations that would assure Mr.
19 DeMocker of the opportunity for periodic visits with his daughters and his family and
20 his loved ones.

21 RESPECTFULLY SUBMITTED this 26th day of May, 2010.
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24 By: _____

25 John M. Sears
26 P.O. Box 4080
27 Prescott, Arizona 86302
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OSBORN MALEDON, P.A.
Larry A. Hammond
Anne M. Chapman
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

Attorneys for Defendant

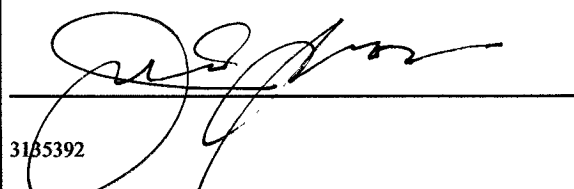
ORIGINAL of the foregoing filed
this 26th day of May, 2010, with:

Jeanne Hicks,
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered
this 26th day of May, 2010 to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Joseph Butner, Esq.
Prescott Courthouse basket



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